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No. 79-1236

In The

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. CARSON, LAWRENCE HATCHER, AND STUART E. MINES,

Petitioners,

vs.

AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY, LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION, and TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN BRANDS, INC.

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QUESTION PRESENTED

Whether the District Court's order refusing to enter a proposed consent decree is an appealable interlocutory order under either 28 U.S.C. § 1291 or § 1292(a)(1).

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BRIEF OF RESPONDENT AMERICAN BRANDS, INC.

STATEMENT OF THE CASE

Petitioners Frank L. Carson, Lawrence Hatcher and Stuart E. Mines filed this action against respondents American Brands, Inc. t/a The American Tobacco Company ("American"), Local 182, Tobacco Workers International Union, and Tobacco Workers International Union on October 24, 1975, in the United States District Court for the Eastern District of Virginia, Richmond Division. Petitioners brought the suit on behalf of themselves and an alleged

class consisting of "all black persons who have sought employment and who are employed or might in the future be employed by the Company's [American's] Richmond Leaf Department. . . ." They alleged violations by respondents of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII") and of 42 U.S.C. § 1981 (J.A. la-12a). In their respective answers, respondents denied any violation of the cited statutes (J.A. 13a-23a).

On January 27, 1976, at a pre-trial conference, an order was entered by the District Court allowing time for discovery and setting the case for trial to begin on May 2, 1977. By letter dated March 25, 1977, counsel for petitioners informed the Court that the parties would present a consent decree at the final pre-trial conference on April 1, 1977, and that they wished to discuss the entry of the proposed decree at that conference.

During the course of the April 1 conference, the Court expressed concern about the effect of the proposed decree on individuals other than the parties before the Court and questioned whether certain provisions of the tendered decree might be violative of the law. The District Court noted that the parties were jointly seeking entry of the decree and to that extent were no longer in an adversary posture, and requested that the parties submit memoranda in support of entry.

After receiving the requested memoranda, the Court, by order dated June 1, 1977, declined to enter the tendered decree. *Carson* v. *American Brands, Inc.*, 446 F. Supp. 780 (E.D. Va. 1977). On June 24, 1977, petitioners filed a notice of appeal from the order to the Court of Appeals for the Fourth Circuit (J.A. 57a-58a).

By order dated October 12, 1977, the Court of Appeals established a briefing schedule. However, on January 10,

1978, before briefs were due, respondents informed the clerk of the Court of Appeals that they had no position on the merits of the appeal and that the appeal was not an adversary proceeding as required by Article III of the United States Constitution. Respondents stated that under these circumstances, they would not submit briefs unless so ordered by the Court (J.A. 59a-60a).

Petitioners then filed a motion in the Court of Appeals for summary reversal of the District Court's order, and the Court of Appeals ordered respondents to brief a position in opposition to the motion for summary reversal. The brief was submitted and the Court of Appeals denied petitioners' motion by order entered on January 31, 1978, an order which was rescinded on February 8, 1978. On March 27, 1978, the Court of Appeals again denied the motion for summary reversal and directed the clerk to invite respondents to file a brief addressing the merits of the appeal (J.A. 62a-64a).

A panel of the Court of Appeals heard oral argument on October 3, 1978. While the matter was under advisement, the clerk informed the parties by letter dated January 25, 1979, of the panel's concern as to whether it had jurisdiction to entertain the appeal in light of a recent opinion, *Seigal* v. *Merrick,* 590 F.2d 35 (2d Cir. 1978), and requested that counsel file supplemental memoranda addressing this concern by February 9 (J.A. 65a-66a). After the filing of the requested memoranda, the Court of Appeals, *sua sponte,* agreed to *en banc* consideration of the case without oral argument on June 5, 1979.

On September 14, 1979, the Court of Appeals, three judges dissenting, dismissed the appeal holding that the District Court's refusal to enter the proposed consent decree was not an appealable order under 28 U.S.C. § 1292(a)

(1). *Carson* v. *American Brands, Inc.*, 606 F.2d 420, 425 (4th Cir. 1979). The mandate of the Court of Appeals issued on October 5, 1979, in accordance with Fed. R. App. P. 41. Petitioners made no attempt to obtain a stay of the mandate.

After informing petitioners' counsel by letter that respondents no longer consented to the entry of the proposed decree, the respondents, by motion filed with the District Court on October 10, 1979, requested the Court to hold a pre-trial conference for the purpose of establishing a new trial date. In the motion, respondents stated that they no longer consented to the entry of the proposed decree (J.A. 67a-68a). Petitioners filed no response to this motion, nor did they at any time lodge an objection to respondents' withdrawal of consent with either the Court or counsel.[1]

By notice dated November 2, 1979, the parties were advised that the case had again been placed on the docket for trial (J.A. 69a-70a), and at a pre-trial conference on November 15, 1979, the District Court set the case for trial to begin on February 4, 1980. Petitioners made no objection.

Two weeks after the conference at which the case was set for trial, respondents were served with petitioners' application for an extension of time in which to file a petition for writ of certiorari. On December 5, 1979, petitioners moved

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[1] Respondents suggested in their Brief in Opposition to Petition for Writ of Certiorari that there was no "case or controversy" within the meaning of Article III of the United States Constitution and that the issue on this appeal should be considered moot in view of respondents' withdrawal of consent to the proposed decree, which occurred without objection by petitioners when the case was back before the District Court for the first time in 28 months, there having been no stay of the mandate (Resp. Br. in Opp. at 4-10). Certiorari having been granted, American will brief here only the merits of the issue on appeal.

the District Court for a stay of all further proceedings pending disposition of their petition. The District Court granted this request by order dated December 17, 1979.

This Court granted the petition for writ of certiorari on June 16, 1980, and expressly limited the appeal to the question of whether an order refusing to enter a proposed consent decree is an appealable order under 28 U.S.C. § 1291 or § 1292(a)(1).[2]

SUMMARY OF ARGUMENT

I.

The finality requirement of 28 U.S.C. § 1291 represents a legislative judgment that a succession of separate appeals from interlocutory orders would have a debilitating effect on judicial administration. The District Court's order rejecting a proposed consent decree does not come within the small class of exceptions to the final judgment rule established by the judicially-created "collateral order" doctrine.

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[2] Petitioners' Statement of the Case (Pet. Br. at 5-21) contains few citations to the joint appendix or record in the case to support their factual allegations, particularly with respect to the description of employment practices and policies at American's Richmond Leaf Plant. Petitioners' description of such practices and policies is largely inaccurate, but those practices and policies are not relevant to the limited issue of appealability before this Court.

American is compelled to comment on petitioners' referring the Court to *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), for a description of "the operation of the American Tobacco Company" (Pet. Br. at 8 n.1). The *Russell* case has no relevance here whatsoever. First, the merits of American's operations are not at issue on this appeal. Second, even if the merits were at issue, the *Russell* case concerns an entirely different facility, in a different state, and thus the facts stated in *Russell* (not part of the record in this case) are irrelevant. Moreover, the *Russell* action is presently pending in the Middle District of North Carolina on reconsideration in light of *International Bhd. of Teamsters* v. *United States,* 431 U.S. 324 (1977), and other recent Supreme Court cases.

The District Court's order does not satisfy any element of this Court's three-part collateral order test. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). First, the order did not conclusively determine any disputed question. Even assuming that there is a general right to settle litigation, nothing in the District Court's order precluded settlement at another time by the tendered decree or some alternative consent decree.

Second, the District Court's order did not resolve an important issue completely separate from the merits. Petitioners contend that the important collateral issue is the right to settle a Title VII class action under *Weber* (*United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979)). The *Weber* opinion, however, was delivered two years after the District Court's order, was not considered by the courts below, and is encompassed within the questions denied review by the Court in this case. Even assuming that *Weber* is applicable to settlement of litigation, the District Court's order in this case of necessity involved considerations that were enmeshed in the factual and legal issues comprising petitioners' claims, and so no "collateral" rights were injured by the District Court's order. Furthermore, the importance of the right to settle Title VII actions is no different from the right to settle any other litigation, and there is no reason for creating a special exception to the final judgment rule for Title VII cases.

Third, the District Court's order is effectively reviewable, both before and after possible trial, and therefore fails to satisfy the final prong of the collateral order test. The same or alternative consent decree proposals could be presented by the parties for the District Court's consideration at any stage of the litigation. If none are accepted and the

parties go to trial, any party could advocate on appeal therefrom the settlement alternative most favorable to its position. In situations where actual final determinations are made to the detriment of legitimate rights, immediate appellate review is available through certification or mandamus. In sum, no irreparable harm would flow from a decision holding the collateral order doctrine inapplicable and postponing appellate review until final judgment.

II.

28 U.S.C. § 1292(a)(1), the statutory exception to the rule of finality held by the Court of Appeals below to be inapplicable to the District Court's order rejecting a proposed consent decree, has always received a narrow interpretation by this Court. Postponing appellate review in this case presents no serious, irreparable consequences such as would warrant expansion of § 1292(a)(1).

After rejection of the tendered decree, petitioners remained fully able to obtain injunctive relief through alternative settlement proposals, a motion for injunctive relief, an award of injunctive relief following trial, or through imposition of such relief on appeal. Nothing in the opinions of the courts below foreclosed any of these opportunities to seek and obtain injunctive relief. The District Court's order thus produced no irreparable effect because it could be reviewed both prior to and after final judgment. *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

Denial of entry caused no serious or irreparable harm for the further reason that it did not dispose of any claims for injunctive relief. The District Court may have expressed an opinion concerning the lawfulness of the tendered decree, but it did not pass on the legal sufficiency of petitioners'

claims for injunctive relief in any other form and under any other factual circumstances.

The narrow interpretation accorded § 1292(a)(1) by this Court has often followed from weighing the consequences of postponing appeal against the vital judicial interests militating against piecemeal review. The result urged here by petitioners would create the potential for multiple and unnecessary appeals, injecting appellate courts indiscriminately into the trial process. The consequences of postponing appeal of an order rejecting a consent decree, on the other hand, are minimal and remediable both prior to and after final judgment.

ARGUMENT

I.

The District Court's Order Refusing Entry Of A Proposed Consent Decree Is Not Appealable Under The Judicially Created "Collateral Order" Exception To 28 U.S.C. § 1291

The finality requirement of 28 U.S.C. § 1291[3] embodies a long-standing legislative judgment that " '[r]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.' " *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 471 (1978), quoting from *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 170 (1974). The policy of finality serves to avoid the "obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litiga-

[3] 28 U.S.C. § 1291 permits appellate review only from "final decisions of the district courts of the United States," except where a direct review may be had in the Supreme Court.

tion may give rise." *Cobbledick* v. *United States,* 309 U.S. 323, 325 (1940).

No one here contends that the District Court's order refusing to enter a proposed consent decree was a "final decision" within the literal dictates of § 1291. Appealability of an order refusing entry, therefore, lies only if the order comes within an appropriate exception to the final judgment rule.

Petitioners now contend that appealability of the District Court's order under § 1291 may be premised on the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949).[4] This Court recently articulated a strict test for application of the doctrine when it held in *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at

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[4] There is some confusion as to whether petitioners' "collateral order" theory of appealability was properly presented to the Court of Appeals. At one point in the appeal, petitioners explicitly denied that the collateral order doctrine was an issue in the case. In petitioners' Supplemental Memorandum to the Fourth Circuit Court of Appeals, filed February 9, 1979, they stated (at 2):

> Because this case does not invoke the "collateral order doctrine" of *Cohen* [v. *Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949)], *Seigal* [v. *Merrick,* 590 F.2d 35 (2d Cir. 1978)] is inapplicable.

Petitioners maintain in their brief to this Court (Pet. Br. at 20 n. 9), however, that they intended the Court of Appeals to consider this theory as an alternative to 28 U.S.C. § 1292(a)(1). The opinion of the Court of Appeals does not address the collateral order issue, and it is clear from the statement of the issue before the Court of Appeals that it was not considering § 1291 (606 F.2d at 421):

> Plaintiffs seek an interlocutory appeal under 28 U.S.C. § 1292(a)(1) of the district court's refusal to enter a consent decree agreed to by the named parties in a Title VII class action.

Should this Court decide that the collateral order doctrine was not properly submitted to the Court of Appeals, it should not now consider this issue. *Tacon* v. *Arizona,* 410 U.S. 351 (1973); *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144 (1970).

468, that a trial court's denial of class certification is not appealable as a collateral order:

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. (Footnote and citations omitted.)[5]

Application of the *Coopers & Lybrand* test to this case demonstrates that no prong of the three-part conjunctive test can be met with respect to the order refusing to enter the proposed consent decree.

A. The Order Did Not Conclusively Determine The Disputed Question

The District Court's order does not satisfy this Court's requirement that the order "must conclusively determine the disputed question. . . ." *Id.* Petitioners claim that the "disputed question" is the "right to reach a lawful settlement of a Title VII employment discrimination case pursuant to the guidelines set forth by this Court in *Weber*. . ."[6] (Pet. Br. at 30).

Even assuming the existence of such a right, the plain fact is that there was nothing in the District Court's opinion which precluded the possibility of settlement. This was

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[5] The articulation of this test has prompted the Second Circuit to observe that the *Coopers & Lybrand* decision evidences that "[t]he Supreme Court has recently given an even firmer direction. . ." to that Circuit's "disinclination to erode the finality doctrine by indirection." *Seigal* v. *Merrick*, 590 F.2d 35, 37 (2d Cir. 1978).

[6] "Weber" refers to *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979).

clearly recognized by the Court of Appeals when it observed (606 F.2d at 424):

> Under the *Flinn* [v. *FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976)] analysis, the named parties may present a proposed decree to the district court in any form and at any stage in the proceedings. If one decree is refused another may be proposed. At any time the district court can reconsider its refusal to enter a decree. *See Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. at 547, 69 S.Ct. 1221.
>
> When a district court objects to the terms of a decree, alternative provisions can be presented, and perhaps a disapproved decree may be entered with further development of the record.

Accordingly, in contrast to an order of a trial court denying to a party the right to security for reasonable expenses that might otherwise be unrecoverable, *Cohen* v. *Beneficial Industrial Loan Corp., supra,* or one that purports to make final disposition of a claimed right to notice costs that might otherwise be irretrievable, *Eisen* v. *Carlisle & Jacquelin, supra,* the District Court's order in this case was inherently tentative and incomplete. A decision to allow immediate appellate review of such an inconclusive order (*Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 476):

> thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—"that of maintaining the appropriate relationship between the respective courts. . . . This goal, in the absence of most compelling reasons to the contrary, is very much worth preserving." [Citing *Parkinson* v. *April Industries, Inc.*, 520 F.2d 650, 654 (2d Cir. 1975)]

This admonition is applicable here notwithstanding petitioners' weak claim that the "*tenor* of the district court's

opinion below *tended* to indicate that a final determination had been made." (Pet. Br. at 41; emphasis added.) Petitioners' speculation about the District Court having made a "final determination" of their alleged right to settle, a right premised on a case which had not been decided at the time of the District Court's decision and which is, in any event, of questionable applicability,[7] cannot serve as a workable test for appealability, nor does it present a compelling reason for thrusting an appellate court into the trial process. The courts of appeals should not have to examine whether a district court's refusal to enter a proposed consent decree conclusively determined the disputed question by having to assess something as nebulous as the "tenor" of its opinion.

The right to reach a settlement in this case having remained open to petitioners in many forms, including requesting reconsideration by the District Court of the tendered decree, there was no "conclusive determination of the disputed question." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 468.

B. The Order Did Not Resolve An Important Issue Completely Separate From The Merits

Nor can this order satisfy the second prong of the collateral order test of "resolv[ing] an important issue completely separate from the merits of the action. . . ." *Coopers & Lybrand* v. *Livesay, id.* Here again, that "issue," as framed by petitioners, is their alleged right to settle "pursuant to the guidelines set forth by this Court in *Weber*" (Pet. Br. at 30). They claim that such a "right" is "separate and anterior to the merits of the claims in the Title VII action" (*id.*) and "not enmeshed in the issues of a Title VII suit" (*id.* at 32).

[7] See discussion *infra,* at 13-14.

It is first noted that the existence of the "right" to settle pursuant to the tendered decree, as now articulated by petitioners, is an issue encompassed within the "abuse of discretion" questions expressly excluded from the grant of certiorari in this case.[8] Such a "right" is not a part of the narrow procedural question as to which certiorari was granted, particularly when the issue was not briefed or argued in the courts below. As the majority in the Court of Appeals properly observed (606 F.2d at 424):

> Such argument is vital when appellate courts must authoritatively opine about important unsettled legal issues of the highest social concern in the amorphous context of reviewing a trial court's exercise of discretion.

This observation is even more pertinent in reviewing such an issue in the context of a narrow procedural question.

Further, there is no such thing as a *Weber* right to settle in a litigation context. *Weber* did not involve settlement by parties in litigation. The limited crafts training affirmative action plan agreed to in *Weber* by the employer and the

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[8] The questions presented in the petition and excluded by this Court's order issuing the writ of certiorari were the following:

> 2. Whether the federal district court below erred in holding that the due process clause of the Fifth Amendment to the Constitution of the United States and Title VII of the Civil Rights Act of 1964, prohibit federal courts from judicially approving, in the absence of discrimination by defendants against plaintiffs and other class members, proposed consent decrees providing for remedial use of race-conscious affirmative action program in accordance with requirements set forth in *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, —— U.S. —— 61 L. Ed. 2d 480 (1979)?
>
> 3. Whether the district court below applied proper criteria, or otherwise abused its discretion, under Federal Rules of Civil Procedure 23(e) in refusing to approve a proposed settlement by the parties of a Title VII class action?

union in a collective bargaining setting did not involve judicial intervention in any form, either under Fed.R.Civ.P. 23(e) or through imposition of a remedy following trial. The constitutionality of such judicial intervention was not at issue. *Cf., Shelley* v. *Kraemer,* 344 U.S. 1 (1947).

In any event, whether *Weber* is or is not involved, a right to settle in a Title VII action is not *"completely* separate from the merits of the action" (emphasis added) as required by the *Coopers & Lybrand* test. Fed.R.Civ.P. 23(e) and the appellate abuse of discretion test for review of trial court approval or rejection of consent decrees require that a district court make a preliminary assessment of the merits of the positions of the parties in considering a proposed consent decree. *See, e.g., Seigal* v. *Merrick, supra,* 590 F.2d at 38; *Flinn* v. *FMC Corp.,* 528 F.2d 1169 (4th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976).[9] Unlike the situation posed in *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555 (1963), wherein the trial court's order determined the ancillary but vital issue of proper forum, or that presented by *Cohen* v. *Beneficial Industrial Loan Corp., supra,* wherein the trial court ruled on the collateral but critical question of whether a shareholder was required to post security for costs, the District Court's order in this case of necessity involved considerations that were "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile National Bank* v. *Langdeau, supra,* 371 U.S. at 558.

Such involvement with the factual and legal issues com-

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[9] *See also West Virginia* v. *Chas. Pfizer & Co.,* 440 F.2d 1079, 1085 (2d Cir.), *cert. denied sub. nom., Cotter Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971); *In re International House of Pancakes Franchise Litigation,* 487 F.2d 303, 304 (8th Cir. 1973); *United Founders Life Ins. Co.* v. *Consumers Nat'l Life Ins. Co.,* 447 F.2d 647, 655 (7th Cir. 1971).

prising petitioners' cause of action would in all likelihood have been even greater had the *Weber* issue been presented to the District Court. Petitioners' reliance on the language in *Weber* indicating that because the plan there was voluntary, the Court was "not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act," (Pet. Br. at 32), is inappropriate to a matter in litigation, especially where a court must meet its Rule 23(e) responsibilities.

The petitioners and all of the *Amici* also argue that the right to settle a Title VII action is such an "important issue" that to deny appealability of an order refusing entry of a consent decree in a Title VII action will undercut the policy of Title VII favoring voluntary conciliation and settlement. Although that argument has some surface appeal, it does not withstand examination.

Title VII does favor conciliation and the avoidance of litigation,[10] but as this Court has recognized, that policy,

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[10] 42 U.S.C. § 2000e-5 (1976) contains the only language in Title VII with respect to conciliation, and that applies only to the Equal Employment Opportunity Commission. Section 2000e-5(b) provides:

* * *

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, *the Commission* shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. (Emphasis added.)

Section 2000e-5(f)(1) provides:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, *the Commission* has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, *the Commission* may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . .

to the extent it is expressed in the Act itself, is applicable only to the agency proceedings level (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)):

> Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion *before the aggrieved party was permitted to file a lawsuit.* (Emphasis added.)

Even the dicta from *Dent* v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969), cited by petitioners for the proposition that "efforts should be made to resolve these employment rights by conciliation both before and after court action" (Pet. Br. at 35), was premised on a specific provision of Title VII applicable only to the Equal Employment Opportunity Commission and not to Title VII litigation generally.[11]

Accordingly, to the extent there is a policy promoting settlement of Title VII cases once they are in litigation, it

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(Cont. from preceding page)

* * *

> Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of *the Commission* to obtain voluntary compliance. (Emphasis added.)

[11] *Dent* v. *St. Louis—San Francisco Ry., supra,* 406 F.2d at 402:

> Section 706(e) further provides:
>
> Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending. . . *the efforts of the Commission to obtain voluntary compliance.* (Emphasis added.)

is no different from the general judicial policy favoring settlement in any litigation. *See, e.g., Williams* v. *First National Bank,* 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts. . . ."); *Speed Shore Corp.* v. *Denda,* 605 F.2d 469, 473 (9th Cir. 1979) ("It is well recognized that settlement agreements are judicially favored as a matter of sound public policy"); *Autera* v. *Robinson,* 419 F.2d 1197, 1199 (D.C. Cir. 1969) ("Voluntary settlement of civil controversies is in high judicial favor"); *W. J. Perryman & Co.* v. *Penn Mutual Fire Insurance Co.,* 324 F.2d 791, 793 (5th Cir. 1963) ("The law favors and encourages compromises"). The importance of a right to settle in Title VII actions is thus the same as in any other litigation and there is no reason for carving out a special exception to the final-judgment rule for settlement agreements in Title VII cases, just as this Court has held that there is no reason for carving out a limited exception to the exclusive bargaining principle under the National Labor Relations Act to accommodate the public policy purposes of Title VII in the curing of discrimination. *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975).

This Court has also observed in an analogous context relative to special rules in class actions that (*Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 470):

> Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation.

This reasoning is every bit as applicable here, there being no unique provisions covering appeals in Title VII cases. Directly *apropos,* also, is this Court's observation (*id.*):

> Respondents, on the other hand, argue that the class action serves a vital public interest and, therefore, special rules of appellate review are necessary to ensure that district judges are subject to adequate supervision and control. Such policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide.

For all these reasons, the order in the case now before this Court cannot meet the second prong of the collateral order test of "resolv[ing] an important issue completely separate from the merits of the action. . . ." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 468.

C. The Order Is Not Effectively Unreviewable

The third prong of the collateral order doctrine is that the order "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 468.

As the Court of Appeals indicated, after final judgment either party to the proposed consent decree may ask for review of the District Court's order denying entry of the decree, or, for that matter, of several alternative decrees. The parties could then argue (606 F.2d at 424):

> the importance of the law and facts as they appeared when the decree was proposed. Where alternative or revised decrees have been presented, the parties could advocate on appeal the alternative most favorable to their positions in light of the law and facts appearing when it was presented.

The availability of such final judgment review takes the denial of entry of a proposed decree out of the rubric of the third prong of the collateral order test.

Petitioners, in addressing this aspect of the collateral order rule, state that the test is that "the order must be one whose review cannot be postponed until final judgment because delayed review will cause irreparable harm by causing the rights conferred to be irretrievably lost" (Pet. Br. at 29). In their very short treatment of this third prong of the test (Pet. Br. at 43), however, they simply refer to "the reasons previously mentioned [in petitioners' brief] . . . with respect to why the district court's order in this case was a final determination of petitioners' collateral rights [and] . . . caused petitioners' irreparable injury." *Id.* Those reasons are three in number, and none of them constitute the claimed irreparable harm justifying immediate appellate review.

Petitioners' first reason is "[t]he right to reach a lawful settlement . . . pursuant to the guidelines set forth by this Court in *Weber* . . ." (Pet. Br. at 30). As is discussed, *supra,* at 13-14, there is no such right. Its possible existence is not a part of the narrow issue as to which certiorari was granted. Even if there were such a right, there was nothing in the District Court's order which precluded the right to settle, including reconsideration of the proposed consent decree, as facts were further developed or as changes in the law occurred after the order was entered.

The second reason advanced is the alleged *"tenor* of the district court's opinion below [which] *tended* to indicate that a final determination had been made" with respect to the so-called *Weber* right to settle (Pet. Br. at 41; emphasis added). This reason has been treated, *supra,* at 10-12. It is simply too speculative to support a claim of irreparable harm. Indeed, this reason does not comport with reality because the opinion of the District Court is dated June 1, 1977, more than two years before this Court announced

the *Weber* decision on June 27, 1979. Given this fact, it is hard to see how petitioners can seriously maintain that the district judge made a "final determination" as to their alleged *Weber* right to settle.

Assuming, *arguendo,* that the District Court's order was a final determination as claimed by petitioners, immediate remedies were available which negate any claim of irreparable harm in having to await post-judgment review. Where a district court clearly abuses its discretion in rejecting a proposed consent decree, a writ of mandamus under 28 U.S.C. § 1651 (1976) and Fed.R.App.P. 21(a) provides interlocutory review. *See Axim & Sons Lumber Co.* v. *Long Island Rail Road Co.,* No. 79-3082 slip op. (2d Cir., August 11, 1980); *Rodgers* v. *U. S. Steel Corp.,* 541 F.2d 365, 372 (3d Cir. 1976). Another means of obtaining prompt review exists under the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), which permits interlocutory review of a controlling and unsettled question of law where "an immediate appeal from the order may materially advance the ultimate termination of the litigation, . . ." 28 U.S.C. § 1292(b) (1976).[12] *See, e.g., Ruiz* v. *Estelle,* 609 F.2d 118, 119 (5th Cir. 1980).

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[12] 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The final reason stated by petitioners in support of their claim of irreparable harm is that "there would be no way in which the parties, despite whatever might be done upon review of final judgment, could retrieve the advantages which a settlement would have brought" (Pet. Br. at 42). It is unclear what petitioners mean by "advantages," but whatever is intended, this reason does not rise to the level of irreparable harm as claimed by petitioners and, in fact, when analyzed, shows why there should be no exception to the finality rule for an order denying entry of a consent decree.

"Advantages" may mean the injunctive relief which was contemplated by the decree. If so, and the District Court did abuse its discretion in declining to enter the order, that advantage would be retrievable on post-judgment review.

On the other hand, if "advantages" means the loss of the opportunity to avoid the time and expense of further litigation, the facts of this case show that allowing immediate appeal from an order denying entry of a consent decree does not assure preservation of that advantage. Had the matter remained with the District Court, it could have been tried as early as June 1977. The parties' time and expense would be considerably less than has been incurred through the appellate procedure. This is also true had the matter been tried at the second trial date, February 4, 1980, following remand from the Court of Appeals. As it is, whatever decision is made on the procedural issue before this Court, resolution of the matter is still a long way off and at much greater expenditure of time and money than if the case had gone to trial or been resolved otherwise at a much earlier date.

These observations are particularly significant here where the theory now advocated by petitioners—a *Weber* right to settle—only arose during the course of the appellate

process. This highlights the danger that allowing immediate appeals from refusals to enter consent decrees will stimulate parties to take appeals in the hope that future developments in the law will help their cause. Such tactics will clog appellate calendars, delay resolution of cases, and force appellate courts to "authoritatively opine about important unsettled legal issues of the highest social concern" (*Carson* v. *American Brands, Inc., supra,* 606 F.2d at 424) without development of proper factual records and argument. These results would bring to realization the concern of this Court in *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 476, that allowing immediate appeal from non-final orders "thrusts appellate courts indiscriminately into the trial process" and "defeats one vital purpose of the final judgment rule," that is, preserving the dichotomy of trial and appellate functions established for the respective courts and critical to the smooth operation of any judicial system.

In sum, the order here is effectively reviewable on appeal. There is no irreparable harm in postponing appellate review until after final judgment. To the extent there is any doubt about the effectiveness of post-judgment review, it must be resolved against appealability in this case when examined in the light of the important competing interests of weighing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

Accordingly, the District Court's order refusing entry of the proposed consent decree meets none of the prongs of the test for applicability of the collateral order doctrine. To allow an interlocutory appeal here would strip § 1291 of all significance. The Court of Appeals was correct in determining (606 F.2d at 424):

> We think this Title VII interlocutory appeal should be dismissed. Our review of this pretrial order has halted the litigation for over two years pending review of the district court's exercise of discretion. Given this disruption and the difficult burden on appeal of demonstrating an abuse of discretion, plaintiffs have identified no consequence requiring appellate review before final judgment. We perceive none. Instead, we think our review is best left to follow final judgment.

D. The Reasoning Of The Ninth Circuit In Norman v. McKee Is Not Persuasive

Petitioners and the *Amici* urge that the Ninth Circuit's opinion in *Norman* v. *McKee*, 431 F.2d 769 (1970), *cert. denied*, 401 U.S. 912 (1971), is in conflict with the decision of the Court of Appeals below and with *Seigal* v. *Merrick*, 590 F.2d 35 (2d Cir. 1978), and they argue that *Norman* states the better rule, *i.e.*, that orders refusing settlements of class action cases are appealable collateral orders.[13] *Norman* is not persuasive here for a number of reasons.

First of all, the *Norman* case was decided in 1970, some eight years before this Court's decision in *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. 463, and the Ninth Circuit did not have the benefit of this Court's further explanation of the collateral order doctrine as set forth in that case. The Second Circuit's decision in *Seigal* was thus better reasoned than *Norman* because it considered the *Coopers & Lybrand* decision.

Secondly, this Court's focus in *Coopers & Lybrand* was on the subjective economic factors which had evolved in

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[13] As noted, *supra*, n.4, the Court of Appeals below did not pass upon the applicability of the collateral order doctrine to the District Court's June 1, 1977 order refusing entry of the tendered consent decree.

the courts below for determining under the "death knell" doctrine when a refusal to certify a class action was or was not appealable. The concern was that "[u]nder the 'death knell' doctrine, appealability turns on the court's perception of [the economic] impact in the individual case." *Coopers & Lybrand v. Livesay, supra,* 437 U.S. at 470-71. The Court observed (*id.* at 473):

> A threshold inquiry of this kind may, it is true, identify some orders that would truly end the litigation prior to final judgment; allowing an immediate appeal from those orders may enhance the quality of justice afforded a few litigants. But this incremental benefit is outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice.

Norman turned on just such an economic, "individualized jurisdictional inquiry." Having noted that "stockholder derivative suits and class actions generally present complex questions and involve large numbers of exhibits and witnesses," the *Norman* court then concluded (431 F.2d at 779):

> The present case is a good example. The trial would be lengthy and expensive. In this situation, therefore, we think that the cost and delay of the piecemeal review, as balancing factors, are diminished in importance. . . .

Based on such economic factors, the *Norman* court ruled in favor of immediate appeal from an order denying entry of a consent decree. Had the matter in *Norman* not involved a "lengthy and expensive" trial, the result could well have been different. Such an individualized, economic approach

to appealability runs contrary to the *Coopers & Lybrand* analysis.[14]

The decision in *Norman* has also been properly criticized for its failure to recognize that judicial review of a proposed settlement is not devoid of some examination of the underlying cause of action, *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1119 (7th Cir. 1979).[15] As the Court of Appeals below stated, quoting *Seigal* v. *Merrick, supra,* 590 F.2d at 37 (*Carson* v. *American Brands, Inc.,* 606 F.2d at 423):

> [A]n order disapproving a settlement . . . is based, in part, upon an assessment of the merit of the positions of the respective parties, and permits the parties to proceed with the litigation or to propose a different settlement.

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[14] The Court of Appeals for the Second Circuit focused on this length of trial-cost factor analysis in explaining, in part, why they "must differ with our friends on the Ninth Circuit," by observing (*Seigal* v. *Merrick,* 590 F.2d at 39):

> In *Norman* v. *McKee,* the court emphasized that a trial would be expensive and lengthy and that, hence, the cost and delay of piece-meal review, as balancing factors, were diminished in importance.

[15] This decision allowed an appeal from a district court order *approving* a settlement and turned on facts peculiar to that case. Further, the Seventh Circuit correctly recognized the distinction between an approval of a settlement and a disapproval for purposes of appealability under the collateral order doctrine (*id.* at 1119, n. 15):

> In the case at bar, the trial court's approval of the subclass settlement does not lead directly to final judgment. *But unlike a disapproval of a settlement, the trial court's order looks toward neither a renewal of settlement negotiations nor a trial on the merits.* Thus, the danger of appellate court interference with proceedings before the trial court is small in comparison with the danger of denying justice by delay. (Emphasis added.)

For these reasons, the Ninth Circuit's decision in *Norman* is unpersuasive here.

II.

The District Court's Order Refusing Entry Of The Consent Decree Is Not Appealable Under The Congressionally Created Exception To The Finality Rule, 28 U.S.C. § 1292 (a)(1)

A. As A Narrow Exception To The Final Judgment Rule, Section 1292(a)(1) Should Be Strictly Construed

When the pressure for appealability of certain interlocutory orders "rises to a point that influences Congress, legislative remedies are enacted." *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, 181 (1955). These legislative remedies, such as the device of certification under § 1292 (b), explored, *supra,* at 20, create exceptions to the "long-established policy against piecemeal appeals, which this Court is not authorized to enlarge or extend." *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478, 480 (1978).

The Court of Appeals dismissed this appeal on the ground that the District Court's order was not appealable under one of these legislative remedies, 28 U.S.C. § 1292 (a)(1), which allows appeal from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ."

Petitioners and *Amici* contend, however, that the order rejecting the consent decree is appealable under this statutory exception because some terms of the decree involved injunctive-type relief, bringing the order within the literal "refusing . . . injunctions" language of § 1292(a)(1). Even if this were so, however, a literal interpretation of an order as one "refusing" an "injunction" simply because it involves

injunctive relief only begins the inquiry into appealability under § 1292(a)(1). As the Court of Appeals below properly observed, "[a] mere labelling of relief is not sufficient." 606 F.2d at 422 (citing *City of Morgantown, W. Va.* v. *Royal Insurance Co.*, 337 U.S. 254, 258 (1949)).

Rather than apply a literal approach to § 1292(a)(1) that could make immediately appealable any pre-trial order involving claims for injunctive relief, this Court has cautioned that the statute should be approached "somewhat gingerly lest a floodgate be opened that brings into the exception many pre-trial orders." *Switzerland Cheese Association* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966). Thus, its scope is "a narrow one . . . keyed to the 'need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence'." *Gardner* v. *Westinghouse Broadcasting Co., supra,* 437 U.S. at 480, quoting from *Baltimore Contractors, Inc.* v. *Bodinger, supra,* 348 U.S. at 181.

The decision of the Court of Appeals below was the first which analyzed the issue of appealability of an order denying a consent decree under § 1292(a)(1), and in holding such an order to be outside the statute, the Court of Appeals was cognizant of this Court's cautious approach to expanding appealability. While this matter was pending on petition for writ of certiorari, however, the Court of Appeals for the Fifth Circuit seems to have reached a contrary result. *United States* v. *City of Alexandria,* 614 F.2d 1358, 1361 n.5 (5th Cir. 1980). Analysis demonstrates that no "serious, perhaps irreparable, consequence[s]" flow from postponing review of the District Court's order in this case and that the better view was that followed by the Court of Appeals below, not that of the Fifth Circuit.[16]

[16] The Fifth Circuit's opinion in *City of Alexandria* is treated, *infra,* at 36-39.

B. The Rejection Of The Tendered Decree Did Not Cause Irreparable Consequences Which Can Be Alleviated Only Through Allowance Of Interlocutory Appeal

In *Gardner* v. *Westinghouse Broadcasting Co., supra,* this Court held that an order denying class certification under Rule 23 was not appealable under § 1292(a)(1), even though the practical effect of the order was to tentatively refuse a portion of the injunctive relief sought in the complaint. The order in *Gardner* did not have the direct or irreparable effect necessary for § 1292(a)(1) appealability because (437 U.S. at 480-81):

> [i]t could be reviewed both prior to and after final judgment; it did not affect the merits of petitioner's own claim; and it did not pass on the legal sufficiency of any claims for injunctive relief. (Footnote omitted.)

The District Court's order refusing entry of the proposed consent decree was precisely of the same effect as the order denying class certification in *Gardner,* and is therefore also not appealable under § 1292(a)(1).

1. The Order Could Be Reviewed Both Prior To And After Final Judgment

The District Court's rejection of the tendered consent decree did not affect petitioners' ability to obtain injunctive relief at a later stage in the proceedings. As the Court of Appeals for the District of Columbia has stated, in a case cited with approval by this Court in *Sampson* v. *Murray,* 416 U.S. 61, 90 (1974), "[t]he possibility that adequate . . . corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." *Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 259 F.2d 921, 925 (D.C. Cir. 1958). In this case, petitioners remained fully able to obtain in-

junctive relief at any of three later stages—prior to trial, at trial or through a post-judgment appeal.

The most immediate means of obtaining injunctive relief short of trial would have been an alternative consent decree. The District Court's order simply rejected the particular consent decree which was tendered. The parties could have tendered another consent decree, either admitting different facts or awarding different relief, which may well have been approved by the District Court. As the Court of Appeals for the Second Circuit has noted, "the denial of one compromise does not necessarily mean that a 'sweetened' compromise may not be approved." *Seigal* v. *Merrick, supra,* 590 F.2d at 39.

The contention that the "tenor" of the District Court's opinion (Pet. Br. at 41) "effectively denie[d] petitioners and respondents alike the opportunity to settle their dispute voluntarily" (Br. of U.S. at 10) is unavailing. As the Court of Appeals observed, the parties could have presented the same or alternative proposals at any stage in the proceedings (606 F.2d at 424):

> When a district court objects to the terms of a decree, alternative provisions can be presented, and perhaps a disapproved decree may be entered with further development of the record. If the district court refuses a decree because it is presented too early in the litigation, it may be later approved, perhaps following a decisive vote by class members. Whatever the district court's reasons for refusing a decree, appeals of right from those refusals would encourage an endless string of appeals and destroy the district court's supervision of the action as contemplated by Fed.R.Civ.Proc. 23(e).

Thus, petitioners' assumption that all possibility of settlement was foreclosed is mere speculation. Even assuming,

however, that the parties were unable to negotiate an alternative settlement, there remained other means of obtaining injunctive relief short of trial and post-judgment review. If the trial court clearly abused its discretion, a writ of mandamus would provide immediate review. *Rodgers* v. *U.S. Steel Corp.*, 541 F.2d 365, 372 (3d Cir. 1976). If one or more of the parties believed that the District Court's determination involved controlling and unsettled questions of law, resolution of which might materially advance the litigation, a request for certification under 28 U.S.C. § 1292(b) could have been made. *Ruiz* v. *Estelle,* 609 F.2d 118, 119 (5th Cir. 1980). Petitioners attempted neither mandamus nor § 1292(b) certification. However, accepting as true the alleged errors of the District Court set forth by petitioners, either mandamus or § 1292(b) could have provided effective avenues of relief.

Further, although petitioners contend that the District Court's rejection of the decree "precluded a subsequent motion" by them for "a preliminary injunction granting all, or part, of the relief specified in the proposed consent decree," (Pet. Br. at 64), nothing in the District Court's opinion precluded any such application. Had petitioners made application for preliminary injunctive relief, the District Court would necessarily have undertaken *de novo* consideration of the grounds alleged in support. The stipulations that had been of special concern to the District Court when it reviewed the proposed decree[17] would have merited no consideration in the Court's assessment of "the existence of a substantial likelihood that [petitioners] will ultimately

[17] For example, the District Court noted in rejecting the decree that it was particularly concerned with respondents' express denial of unlawful conduct and petitioners' failure to deny respondents' assertion (*see* 446 F.Supp. at 788-89) and with the decree's additional stipulation that "the Court finds . . . that there are no discriminatory hiring practices at [Leaf]" (*id.* at 783).

prevail on the merits" (Pet. Br. at 64-65). Since nothing foreclosed petitioners from applying for injunctive relief and establishing any facts necessary for such relief, the District Court's order did not once and for all deny petitioners "the protection of the injunction prayed . . ." *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932). Rather, "[h]ere, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings." *Carson* v. *American Brands, Inc., supra.* 606 F.2d at 423.

The combination of District Court reconsideration of the proposed order, consideration of an application for a preliminary injunction or of another settlement proposal, the opportunities noted above for expedited interlocutory review, and effective appellate review after final judgment renders unsupportable any claim herein of "irreparable injury." It is not necessary to open the floodgates by judicial expansion of § 1292(a)(1). Like the denial of class certification in *Gardner,* the District Court's initial rejection of a consent decree produces no " 'irreparable' effect" because its order "could be reviewed both prior to and after final judgment." *Gardner* v. *Westinghouse Broadcasting Co., supra,* 437 U.S. at 478.

2. The Order Did Not Affect Or Pass On The Legal Sufficiency Of Any Claims For Injunctive Relief

Nor can it be established that the District Court's order caused a direct or irreparable effect by "affect[ing] the merits" of petitioners' claims for injunctive relief and "pass-[ing] on the legal sufficiency" of any such claims. *Gardner* v. *Westinghouse Broadcasting Co., supra,* 437 U.S. at 481. In an effort to show the necessary "serious, perhaps irreparable" effect, petitioners, as they submit under their collateral order argument, again maintain that the District

Court's order "concerns [their] right under Title VII as well as the parties' right to institute an affirmative action plan" in conformance with the *Weber* decision (Pet. Br. at 66-67 n.21), and that "the order of the district court was based entirely upon its misapprehension of applicable legal principles." (*Id.* at 71).[18]

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[18] Petitioners' argument of irreparable injury by denial of a "*Weber*-type" right in support of their claim of appealability under § 1292(a)(1) seriously undermines their alternative position that the District Court's order was a "collateral order" under *Cohen* v. *Beneficial Indus. Loan Corp., supra,* and its progeny. Petitioners must meet the almost impossible task of establishing that one court order "pass[ed] on the legal sufficiency of [their] claims" (*Gardner, supra*) (§ 1292(a)(1)) and was at the same time "separate and independent" of their claims (collateral order) (§ 1291). They attempt to reconcile these "apparently inconsistent positions" by stating that the two appealability positions "involve different rights," (Pet. Br. at 66-67 n.21):

> With respect to the appealability of the order below as a collateral order, the right affected is the parties' right to *settle* the case, prior to trial, in accordance with standards set forth in *Weber, supra.* This right is, of course, separate and independent of the right sued upon pursuant to Title VII.
>
> On the other hand, the right affected with respect to the refusal of an injunction concerns petitioner's [*sic*] right under Title VII as well as the parties' right to institute an affirmative action plan. The former, of course, is exactly the right sued upon and therefore an order adversely affecting it touches on the merits of the action. (Emphasis in original.)

This attempt at reconciliation fails. Since the proposed consent decree was rejected in part because of the District Court's preliminary determination that the petitioners' claims would not support the proposed relief under Title VII, it is obvious that the decision was inextricably linked to the merits of the main claims. Hence the order rejecting the consent decree cannot, in this case, be "separate and independent" of the Title VII claim for purposes of establishing appealability under the collateral order doctrine.

It stands to reason that a single court order cannot simultaneously be "collateral to" the claim, as required by the collateral order doctrine, while at the same time "affect[ing] the merits" of petitioners' claims and "pass[ing] on the legal sufficiency of any claims for injunctive relief," as required for appealability under § 1292(a)(1).

These claims cannot withstand scrutiny for several reasons. First, as noted in the collateral order section, *supra*, at 10-15, whether a right exists under *Weber* to "institute an affirmative action plan" by way of settlement of a Title VII action is an issue simply not briefed, argued or addressed by the courts below, nor yet addressed by this Court, and indeed is encompassed within the "abuse of discretion" questions specifically denied review in this case.

Second, whatever such *Weber* "settlement rights" may ultimately be discerned, they most certainly did not exist in June 1977 when the District Court made its determination. Had petitioners desired reconsideration of this order in light of *Weber*, they were free to so move when the case returned to the District Court. Yet they made no attempt to obtain reconsideration despite the plain invitation of the Court of Appeals to do so.

Third, assuming that such a "right to settle" a Title VII case pursuant to *Weber* came into existence after the District Court's decision, petitioners would have this Court enlarge the narrow final judgment statutory exception to encompass immediate appeal and review in circumstances where no clear mistake of law was made by the District Court but subsequent changes in the law become the issue on appeal. Such an expansion could open the floodgates to appeal based on predicted or anticipated rights and render nugatory the strict showing of "serious, perhaps irreparable" injury required by § 1292(a)(1).

Accordingly, the applicability of *Weber* to petitioners'

(Cont. from preceding page)

Gardner, supra, 437 U.S. at 480-81 (footnote omitted). Such schizophrenic characterization of a single court order further illuminates the wisdom of this Court's policy of narrowly interpreting the general rule of finality and letting "[t]he choices fall in the legislative domain." *Baltimore Contractors* v. *Bodinger, supra*, 348 U.S. at 181-82.

claim of irreparable injury for purposes of establishing appealability is dubious. Petitioners, however, further contend that denial of interlocutory appeal poses "the danger of serious harm" (Pet. Br. at 72) since the District Court's order "as a practical matter, denied injunctive relief to petitioners on the ground that their claim was legally insufficient," (*id.* at 73), and "settle[d], or tentatively decide[d], the merits of petitioners' claims on the merits" (*id.* at 66). This contention confuses the scope of review required of the District Court in considering a settlement proposal and ignores the tentativeness of any conclusions drawn in such a review as compared with the more exacting standards appropriate to a judgment on the merits.

Although an order rejecting a consent decree may "touch on" the merits of petitioners' claims to the extent that the court must consider the merits of the claims while reviewing a settlement proposal, *see, e.g., Flinn* v. *FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976), such a non-determinative, tentative review of the merits, like the review of the merits which a district court must make in deciding a motion for class certification, "does not otherwise reflect on the legal sufficiency of the claim for injunctive relief." *Gardner* v. *Westinghouse Broadcasting Co., supra*, 437 U.S. at 482 n.9. The District Court's order did not impair petitioners' ability to prove facts at trial which may have entitled them to injunctive relief. The contrary conclusion by petitioners and *Amici* (*e.g.*, Pet. Br. at 65) ignores the distinction between findings of fact on the merits and the District Court's review of factual submissions in passing on the sufficiency of a proposed consent decree. In short, while the District Court may have expressed an opinion concerning the lawfulness of the tendered decree, it did not pass on the legal sufficiency of petitioners' claims for

injunctive relief in any other form and under any other factual circumstances. Denial of entry of the particular decree presented here thus caused no "serious, perhaps irreparable" harm.

While the failure of one negotiated settlement, with its attendant benefits such as avoidance of the expense and risk of litigation and conservation of judicial resources (*e.g.*, Br. of U.S. at 10-11), may well be "serious," such a failure would in no way impair the ability of the petitioners to proceed to trial and obtain all available and warranted relief. The District Court's order may have shelved the first settlement proposed and in that sense appeared "serious" and important at the time, yet "[m]any interlocutory orders are equally important,... but they are not for that reason converted into injunctions." *City of Morgantown, W.Va.* v. *Royal Insurance Co.*, 337 U.S. 254, 258 (1949).

By its nature inherently tentative and in no way dispositive of the legal sufficiency of petitioners' claims to injunctive relief, the District Court's order in this case had the same effect as the order found to be outside the scope of § 1292(a)(1) in *Switzerland Cheese Association* v. *E. Hornes Market, Inc.*, 385 U.S. 23 (1966). There, the District Court denied a motion for summary judgment that included prayers for permanent injunctive relief. This Court denied appealability as of right under § 1292(a)(1) "for the reason that the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim." *Id.* at 25. The same result is true in this case. The District Court's order "decide[d] only one thing—that the case should go to trial." *Switzerland Cheese Association* v. *E. Horne's Market, Inc., supra,* 385 U.S. at 25. It did not dispose of any prayers for injunctive relief once and

for all, and thus stands in stark contrast to the order dismissing a counterclaim that included demands for injunctive relief which was found appealable in *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430 (1932).

3. The Fifth Circuit's City Of Alexandria Case Was Wrongly Decided

As noted, *supra*, the Court of Appeals for the Fifth Circuit has rendered a decision seemingly contrary to that of the Court of Appeals below. *United States* v. *City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980). However, what little rationale is provided in *City of Alexandria* is superficial and based in large part upon cited precedent in that Circuit which is of doubtful authority.

The Fifth Circuit explains its position that an order refusing a consent decree containing injunctive relief is appealable under 1292(a)(1) in only a two-paragraph footnote. It determines that, since earlier Fifth Circuit cases had (*id.* at 1361 n.5):

> held that an order *approving* a settlement containing injunctive provisions relating to recruitment and hiring was one " 'granting,' 'continuing,' or 'refusing to dissolve' an injunction," and was therefore appealable. . . . an order *refusing* approval of a consent decree is *necessarily* one "refusing" an injunction for purposes of § 1292(a), and is therefore appealable. (Emphasis added.)

This rationale is mistaken in two respects.

First, the cited precedent relied upon by the Fifth Circuit in *City of Alexandria* for its initial proposition that orders "approving" settlements containing injunctive provisions are always appealable under § 1292(a)(1) as orders

"granting" injunctions does not in fact support that proposition because appeal in none of those cases was expressly premised on § 1292(a)(1). The most recent of the three Fifth Circuit cases relied upon is *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. denied sub. nom., Local 741 International Brotherhood of Electrical Workers* v. *Myers,* 434 U.S. 801 (1977). There, the consent decree which was under review determined not only the issue of liability, but also back pay. *Id.* at 845. Further, the district court "gave final approval to the consent decree between the plaintiffs and the company . . ." after there had been a trial on the merits as to the union's liability. *Id.* at 846. Under these facts, the order could very well have been considered "final" under § 1291. All that was said in *Myers* on the appealability issue consisted of the following (*id.* at 847):

> Appellants argue that since the court order finally approved the settlement and thus effected certain changes in the collective bargaining agreements retroactive to January 1 1975, the order was one "granting," "continuing," or "refusing to dissolve" an injunction under section 1292(a). Injunctive provisions of a consent decree have recently been held adjudicative and appealable by this court, and consequently this court has jurisdiction in the instant appeal. *See Sagers* v. *Yellow Freight System, Inc.,* 529 F.2d 721, 730 (5th Cir. 1976); *United States* v. *T.I.M.E.-D.C., Inc.,* 517 F.2d 299, 307 n.11 (5th Cir. 1975), *cert. granted,* 425 U.S. 990, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).

This reasoning is devoid of any distinctions between §§ 1291 and 1292(a)(1). It is also devoid of any distinction under § 1292(a)(1) between an approval and a refusal of a consent decree. The opinion does not address the complicated problems involved and cannot be viewed as any

authority on the appealability of an order refusing entry of a consent decree. Moreover, the two Fifth Circuit cases cited as authority in *Myers, i.e., Sagers* v. *Yellow Freight Systems, Inc.*, 529 F.2d 721 (5th Cir. 1976), and *United States* v. *T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir. 1975), *vacated and remanded on other grounds sub nom., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), both involved approvals, not refusals, of consent decrees and contained no discussion whatsoever of either § 1291 or § 1292(a)(1). Thus, the Fifth Circuit's casual reliance on these cases for the initial proposition that every order granting an injunction is immediately appealable under § 1292(a)(1) is suspect.

Second, even if the decisions cited by the Fifth Circuit *had expressly* held that *approval* of a consent decree containing injunctive provisions is always proper for immediate appellate review under § 1292(a)(1), they would still lend no support to the Fifth Circuit's unreasoned leap to the *converse* proposition, *i.e.*, that denial of such a decree is therefore "necessarily one 'refusing' an injunction" and thus appealable under § 1292(a)(1). Such literalism has never been the approved canon of construction for § 1292(a)(1). As another appellate court has properly recognized, "[t]he literal characterization of an order as an injunction only begins the inquiry into appealability." *Stateside Machinery Co.* v. *Alperin*, 526 F.2d 480, 482 (3d Cir. 1975). Were literalism the proper approach, a different result would have been mandated in *Gardner* v. *Westinghouse Broadcasting Co., supra*, since the denial of class certification necessarily and tentatively foreclosed certain prayers for injunctive relief. What the Fifth Circuit failed to appreciate is that entry of consent decrees properly falls within the category of motions which "generate an appealable order if granted, but

not if denied." 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *Federal Practice and Procedure,* § 3924, at 74 (1977).

By failing to consider the policies underlying § 1292(a)(1) and the effects which expanding appeals under the section may have on the judicial system, the Fifth Circuit mistakenly ignored this Court's construction of the § 1292(a)(1) exception as "a narrow one" aimed primarily at "interlocutory orders of 'serious, perhaps irreparable' consequence." *Gardner* v. *Westinghouse Broadcasting Co., supra,* 437 U.S. at 480. The better reasoned opinion is that of the Court of Appeals below, and it should be affirmed.

C. THE BURDEN ON THE JUDICIAL SYSTEM FROM ALLOWING INTERLOCUTORY APPEALS FROM ORDERS REJECTING CONSENT DECREES OUTWEIGHS ANY CONSEQUENCES OF POSTPONING JUDICIAL REVIEW

The Court of Appeals stated that decisions regarding the availability of § 1292(a)(1) interlocutory appeal should turn on a balancing of "the consequence of postponing appellate review" against "the important judicial interests militating against piecemeal review." 606 F.2d at 422, citing *Gardner,* and *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 473 (1978). As demonstrated above, the consequences of postponing appeal of an order rejecting a consent decree are minimal and remediable, both prior to and after final judgment.

By contrast, allowing interlocutory appeals as of right from such orders would substantially impair the interests which the final judgment rule was designed to protect. For one thing, availability of interlocutory review will lessen the incentive of the parties to work with the trial court and quickly resolve the litigation. Parties who spurn the invitation of the trial court to submit alternative pro-

posals will be rewarded with appellate review before they have begun to exhaust the spectrum of remedies available at the district court level. Indeed, parties entering into settlement negotiations in any action could ensure immediate appealability of orders denying their particular agreements simply by incorporating one or more terms calling for some injunctive relief, however inconsequential to the overall settlement scheme such relief might be. Moreover, the result urged by petitioners would create the potential for multiple appeals in every complex case, a result "quite unpredictable in its scope and incidence." *Peter Pan Fabrics, Inc.* v. *Dixon Textile Corp.*, 280 F.2d 800, 806 (2d Cir. 1960) (Clark, J., dissenting).

No summation of the interests and policies militating against immediate review in this case can be clearer or more apt than that of the Court of Appeals (606 F.2d at 425):

> In conclusion, the district court's discretionary decision to send the parties to trial, in lieu of granting immediate injunctive relief before the facts are settled, is not a ruling of irreparable consequence. Plaintiffs may proceed to trial with no loss of either their claims for final injunctive relief or their right of appellate review of the *Flinn* issue. Short of going to trial, the parties may propose alternative decrees to the district court, one of which may be entered. Appellate review of the order is best effected following final judgment. Such review preserves the trial court's exclusive control over the progress of the litigation and facilitates its supervision of the class action.

It has been the long-standing policy of this Court to defer to Congress when novel yet costly expansions of § 1292(a)(1) are offered, and this case presents no compelling circumstances warranting a departure from this policy. As the

Court stated in *Baltimore Contractors, Inc.* v. *Bodinger, supra* (348 U.S. at 181-82):

> The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. . . . This Court . . . is not authorized to approve or declare judicial modification. . . . Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money.

CONCLUSION

For the reasons presented, the decision of the Court of Appeals for the Fourth Circuit should be affirmed and the appeal dismissed.

Respectfully submitted,

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